

06586

Coastal Zone
Information
Center

APR 8 1976

University of Miami
School of Law

U. S. DEPARTMENT OF COMMERCE NOAA
COASTAL SERVICES CENTER
2234 SOUTH HOBSON AVENUE
CHARLESTON, SC 29405-2418

GC57.2

.M545

no.13

JAN 28 1997

OCEAN AND COASTAL LAW PROGRAM

COMMUNITY LEGAL PROBLEM SERVICES

COASTAL ZONE
INFORMATION CENTER

Title: John Pennekamp Coral Reef State Park:
Florida's First Federal Marine Sanctuary?

Requested by: Florida Coastal Coordinating Council and
the Office of Coastal Environment, NOAA

Prepared by: Dennis P. Koehler, Research Assistant
Ocean and Coastal Law Program

Project No. R/L-5 in the University of Miami Sea Grant
Institutional Program

GC
57.2
.M545
no.13

Report No. 13
May, 1974

Property of CSC Library

U. of Miami Sea Grant Program. U. of Miami
SEA GRANT PROGRAM. UNIV OF MIAMI
Program. Ocean Law Program.

JOHN PENNEKAMP CORAL REEF STATE PARK:
FLORIDA'S FIRST FEDERAL MARINE SANCTUARY?

I. INTRODUCTION AND PURPOSE

Florida's famous John Pennekamp Coral Reef State Park, located in and off the coast of Key Largo, is part of the only major reef complex on the East coast, and is the most well developed in the continental United States.¹ It attracts as many as 350,000 visitors annually to enjoy a wide range of recreational activities.² The Division of Recreation and Parks, Florida Department of Natural Resources, is winning the battle to reverse the trends which once threatened to destroy these unique coral reefs and their associated marine life, but is apparently fighting this battle with less than the resources it needs to preserve unimpaired all of the area's scenic and scientific values.

It is the purpose of this report, therefore, to:

a) examine the legal regime which now protects this unique national resource;³ and b) to determine whether designation as

¹Proc. No. 3339, 25 F.R. 2352 (March 17, 1960), set out as a note under 16 U.S.C. § 461. See text accompanying note 10 infra.

²Interview with Captain Arnold Kuenzler, Director, John Pennekamp Coral Reef State Park, Key Largo, Florida (April 22, 1974). The Park's information bulletin lists as permitted recreational activities: tent and trailer camping, picknicking, swimming, fishing, boating (including glassbottom boat tours), nature walks and assorted marine services.

³Jurisdiction over the reef's 100 square miles is shared by the State of Florida and the Federal government. That portion which lies inside the three-mile limit was relinquished to the State of Florida by the United States under the Submerged Lands Act, 43 U.S.C. § 1301 et seq. (May 22, 1953). The remainder lies on the seabed of the outer Continental Shelf outside the seaward boundary of the State of Florida and is subject to

a Federal Marine Sanctuary under Title III of the Marine Protection, Research and Sanctuaries Act of 1972⁴ will further preserve and enhance the Park's resource, recreation and conservation values.

federal jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq. (August 7, 1953). As noted infra, however, actual federal control over the reef park ends at the 60-foot depth curve (10 fathom line) approximately 5-6 miles from the shoreline of Key Largo.

State and Federal environmental control laws of general applicability, such as those prohibiting polluting or dredge and fill activities in coastal waters, will not be discussed here, although their significance to the preservation of the environmental quality of the Preserve can hardly be exaggerated. See generally ENVIRONMENTAL REGULATION AND LITIGATION IN FLORIDA, Chs. 1-2, Continuing Legal Education Committee, The Florida Bar (1973).

⁴
16 U.S.C. §§ 1431-1434, P.L. 92-532, §§ 301-304 (October 23, 1972). Congress enacted this title of the MPRSA to preserve the conservation, recreational, ecological or esthetic valued of certain areas of the Nation's coastal waters by designating them as Federal Marine Sanctuaries. 16 U.S.C. § 1432(a). Title III was somewhat controversial, as it raised questions about the power of the Federal government to unilaterally regulate activities in an area beyond the recognized outer limits of the U.S. territorial sea. Senate Report (Commerce Committee) No. 92-451, 92d Cong., 2d Sess., Nov. 12, 1971, which accompanied H.R. 9727 [the bill which became P.L. 92-532] rejected the marine sanctuaries concept as follows:

"... United States jurisdiction does not extend to foreign people or ships in high seas areas; domestic legislation authorizing designation of marine sanctuaries in such areas would be ineffective unless international agreements were executed to establish sanctuaries and to regulate the conduct of signatories in them." Reprinted in 3 U.S. Code and Admin. News 4241-4242 (1972).

The Conference committee report, however, adopted the marine sanctuaries provision of the House bill:

II. BACKGROUND AND HISTORY

In the late 1950's a number of marine biologists and conservationists became concerned about the extensive damage which was being done to the coral reefs and marine resources lying in the large undersea area off Key Largo. As a John Pennekamp Park brochure states:

" . . . Coral collectors descended upon the reefs in everything from outboard motor boats to barges and with the aid of crowbars and hoists began to tear the coral reefs apart. Cleaned and bleached, coral filled the shelves of hundreds of curio dealers. Commercial shell collectors turned the reefs upside down for rare shells, and tropical fish collectors added to the despoiling. Skin-divers prowled the region, ready with spear and gun to kill angel fish, queen trigger fish and everything that swam."⁵

" . . . modif[ying] the language in some respects to make it clear that the regulations and enforcement activities under the title would apply to non-citizens of the United States only to the extent that such persons were subject to U.S. jurisdiction, either by virtue of accepted principles of international law, or as a result of specific intergovernmental agreements." Reprinted in 3 U.S. Code and Admin. News 4280 (1972).

⁵History of the John Pennekamp Coral Reef State Park (mimeograph) November 1964. There are conflicting reports about the current health of the Park. A recent scientific study revealed that the coral reefs located within the Preserve, although suffering somewhat from sedimentation damage, are relatively healthy. Of the six areas studied, five showed living coral portions ranging from 83.3% to 93.5%. The sixth test area lying about 9 miles south of the Preserve, called the "Hen and Chickens Transect," suffered from excessive coral killing, averaging 83.8% dead coral portions. The scientist who heads the study noted that this area will be the prime target of future investigations, adding that "some of the reefs outside of the State Park are in pretty bad shape." A. Antonius, Final Report

Prodded in no small way by the efforts of Miami journalist John Pennekamp, both the State of Florida and the Federal government finally acted to set aside their respective portions of the area as coral reef preserves.

On December 3, 1959, Florida Governor Leroy Collins transferred control over the submerged lands lying between the shores of Key Largo and the three mile limit to the Florida Board of Parks and Historic Memorials.⁶ On December 10, 1960, Governor Collins dedicated the John Pennekamp Coral Reef State Park in ceremonies held at Harry Harris Park in Tavernier, Florida.⁷ Land purchases made possible by large private contributions in 1961 and 1963 added 2,280 acres as land base of the Park. This area is used primarily for headquarters, service and parking facilities.⁸ The state legislation which

of the Coral Reef Group of the Florida Keys Project for the Project Year 1973, Harbor Branch Foundation, Key Largo, Florida (March 7, 1974) at 175-191. But see the conclusions of Dr. Gilbert Voss, the University of Miami marine scientist who was, with John Pennekamp, perhaps most responsible for the creation of the Preserve:

" . . . Florida's coral reefs face serious trouble indeed -- from unending sources of sediments, high turbidity, unprecedented amounts of sewage, partial eutrophication, disturbed current systems, thermal pollution, high levels of pesticides from south Florida's truck farms, and other factors. And there is no relief in sight. . . . [I]n the not too distant future our children may be able to learn about coral reefs only from books and documentary films, for one of nature's unique habitats will have vanished from the face of the earth." 82 Natural History 40, 47 (1973)

⁶Additional submerged lands were dedicated from the Trustees of the Internal Improvement Trust Fund to the Florida Board of Parks and Historic Memorials on September 12, 1967. 36 TIITF Minutes 300 (1968). Jurisdiction over these state sovereignty lands has since been transferred to the Division of Recreation and Parks, Florida Department of Natural Resources.

⁷History of the John Pennekamp Coral Reef State Park 2.

⁸Id.

provides the basic protection for the reef's natural resources is codified at Chapter 592.17, Florida Statutes.⁹

The Key Largo Coral Reef Preserve was established by proclamation of President Eisenhower on March 17, 1960,¹⁰ and includes that portion of the reef situated between the three mile limit of Florida's submerged lands jurisdiction and the 60-foot depth curve line.¹¹ Today, the State of Florida's Department of Natural Resources administers a cooperative federal and state effort to regulate activities in both coral reef preserves.¹² [Hereinafter called the Preserve.]

The 60-foot depth curve which now marks the seaward boundary of the Preserve does not, however, include all of the undersea coral formations of the area. Some of the reef extends beyond this artificial boundary and is therefore beyond the effective reach of the Park's reef patrol.¹³

The Marine Protection, Research and Sanctuaries Act of 1972, popularly known as the Ocean Dumping Act because of its first two titles,¹⁴ authorizes a maximum annual appropriation

⁹ Chapter 592, F.S., provides the statutory authority for regulating all recreation and parks activities in the State of Florida.

¹⁰ Note 1, supra.

¹¹ For a precise description of the Federal portion of the Preserve, see Proc. No. 3339, cited note 1 supra.

¹² The Department of Natural Resources, through its State Park rangers and reef patrol, is responsible for enforcing protective regulations in the Preserve, which contains both the John Pennekamp Coral Reef State Park and the Key Largo Coral Reef Preserve, for the State and Federal governments. [Interview with Capt. Kuenzler, Park Director, April 22, 1974.]

¹³ The Park Director noted, however, that his reef patrol was usually able to arrest violators as they returned to shore. [Interview, April 22, 1974.]

¹⁴ For an analysis of the full Act, see Reitze, ENVIRONMENTAL PLANNING: LAW OF LAND & RESOURCES, Nineteen-97, North

through FY 1975 of \$10 million for the costs of acquiring, developing and operating marine sanctuaries designated under the Act.¹⁵ Regulations recently proposed by the Department of Commerce to implement Title III of the MPRSA suggest that these marine sanctuaries should include:¹⁶

(a) Areas necessary to protect valuable unique or endangered marine life, geological features, and oceanographic features.

(b) Areas to complement and enhance public areas such as parks, national seashores and national or state monuments and other preserved areas.

(c) Areas important to the survival and preservation of the nation's fisheries and other ocean resources.

(d) Areas to advance and promote research which will lead to a more thorough understanding of the marine ecosystem and the impact of man's activities.

In classifying the types of marine sanctuaries to be established, the proposed regulations include habitat preserves,

American International, P.O. Box 28278, Washington, D.C. 20005 (1974).

¹⁵16 U.S.C. § 1434. Unlike the equally-new Federal Estuarine Sanctuaries Program, authorized by Sec. 312 of the Coastal Zone Management Act of 1972, P.L. 92-583, 16 U.S.C. § 1451 et seq., the Federal Marine Sanctuaries Program contains no guidelines to the states for grant applications. Since the two programs are intended to be cooperative, however, the State of Florida can reasonably expect to receive up to 50% of its marine sanctuary acquisition, development and operation costs. Cf., NOAA Proposed Guidelines for Estuarine Sanctuary Grants. [15 CFR Part 921], 39 F.R. 8924, 8926 (March 7, 1974).

¹⁶39 F.R. 10255 [15 CFR Part 922] March 19, 1974.

which are to preserve, protect and manage "essential or specialized habitats representative of important marine systems;"¹⁷ species preserves, for the maintenance, restocking and future reestablishment of genetic resources;¹⁸ research areas, including natural areas and field laboratories, to "establish ecological baselines against which to compare and predict the effect of man's activities [on natural processes;"¹⁹ and recreational and esthetic areas, to be used to "augment public lands already set aside by local, state or federal government."²⁰

Under the above criteria, the John Pennekamp Coral Reef State Park easily qualifies on all counts for designation as a Federal marine sanctuary.

¹⁷ Id., § 922.10(a).

¹⁸ Id., § 922.10(b).

¹⁹ Id., § 922.10(c).

²⁰ Id., § 922.10(d).

III. IMPACT OF EXISTING AND PROPOSED LEGISLATION

Regulations promulgated under Federal and Florida Statutes appear at first glance to contain ample authority to protect the natural resources located within the present confines of the Preserve. These regulations, all of which are administered by the State of Florida, are virtually identical and include provisions which:

- 1) Prohibit the removal or destruction of natural features and marine life;²¹
- 2) Prohibit dredging, filling, excavating and building activities;²²
- 3) Prohibit the dumping of refuse and polluting substances;²³
- 4) Protect wrecks²⁴ and markers²⁵ from tampering;
- 5) Regulate sport and commercial fishing;²⁶
- 6) Encourage skin diving and underwater photography;²⁷

²¹Ch. 16D-1.11(2) Fla. Admin. Code, Supp. No. 23 (1972 ed.); 43 CFR Part 15.2 (Oct. 1972 ed.).

²²Ch. 16D-1.11(3) Fla. Admin. Code; 43 CFR Part 15.3.

²³Ch. 16D-1.11(4) Fla. Admin. Code; 43 CFR Part 15.4.

²⁴Ch. 16D-1.11(5) Fla. Admin. Code; 43 CFR Part 15.5.

²⁵Ch. 16D-1.11(6) Fla. Admin. Code; 43 CFR Part 15.6.

²⁶Ch. 16D-1.11(7) Fla. Admin. Code; 43 CFR Part 15.7. The Florida rules place additional controls on sport and commercial fishing, and authorize arresting officers to seize and confiscate devices used in violation of State regulations.

²⁷Ch. 16D-1.11(8) Fla. Admin. Code; 43 CFR Part 15.8. The

- 7) Establish a permit system for the collection of scientific specimens;²⁸
- 8) Regulate the operation of watercraft;²⁹ and
- 9) Prohibit the use or possession of explosives and dangerous weapons.³⁰

Although these regulations are being effectively enforced inside the Preserve today,³¹ their impact is nonetheless limited in a number of significant ways. These limitations and the improvements which could be brought about by designating the Preserve as a Federal Marine Sanctuary may be summarized as follows:

A. Insufficient jurisdiction. As mentioned above, not all of the undersea coral formations which compose the reef are

Florida rules also require bathers to "be so covered...as to prevent any indecent exposure of the person or call forth merited criticism."

²⁸Ch. 16D-1.11(9) Fla. Admin. Code; 43 CFR Part 15.9.

²⁹Ch. 16D-1.11(10) Fla. Admin. Code; 43 CFR Part 15.10. The Florida rules contain detailed requirements for all types of diving, sightseeing and fishing operations conducted within the Preserve.

³⁰Ch. 16D-1.11(13) Fla. Admin. Code; 43 CFR Part 15.11.

³¹The Park Director noted that in March, 1973, thirty-six citations were issued for violations of the Park's regulations, the bulk of them (approx. 75%) for violations of the State spear-fishing prohibitions (Ch. 16D-11.1(7)(c) Fla. Admin. Code). Park officials have mounted a large public information program throughout the upper Keys in the past year, however, and the average number of citations issued monthly now ranges from 12-16, 25% of them for coral violations. Virtually all of those arrested had entered the Preserve from boats anchored beyond the 60-foot depth curve which now marks the limit of State jurisdiction. [Interview with Capt. Kuenzler, April 22, 1974]

included within the boundaries of the Preserve.³² As a result neither the Federal government nor the State of Florida apparently has jurisdiction to: 1) control the open-ocean access to the Preserve of those who would seek to remove or otherwise damage its resources, or 2) prevent such persons from damaging or destroying those portions of the reef and its resources which lie beyond the 60-foot depth curve.³³

Designation as a Federal Marine Sanctuary would permit the Administrator of the National Oceanic and Atmospheric Administration (NOAA) to extend the seaward boundary of the Preserve as far out on the Continental Shelf as he or she determines would be "necessary for the purpose of preserving or restoring [its] conservation, recreational, ecological, or esthetic values."³⁴

B. Inadequate penalties for violations. Under Florida law, violations of any of the laws or regulations which protect the Preserve are misdemeanors of the second degree only,³⁵ and are punishable by minor fines up to \$35.³⁶ Although there is

³² See text accompanying note 13, supra; note 5, supra.

³³ Cf. the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §1331 et seq., however, which extends Federal jurisdiction over seabed and subsoil resources out to the edge of the Continental Shelf and would seem to provide ample authority for Federal regulations to control the exploitation of the reef's natural resources beyond the confines of the present Preserve. 43 U.S.C. § 1334(a)(2) provides for a maximum fine of \$2,000, or imprisonment of up to six months, or both, for violations of Interior Department natural resource conservation regulations under OCSLA. The problem is that the regulations which apply to the Key Largo Coral Reef Preserve are limited to the geographical confines of the Preserve and do not extend beyond the 60-foot depth curve.

³⁴ 16 U.S.C. § 1432.

³⁵ Ch. 592.17(3) F.S.

³⁶ The Sixteenth Judicial Circuit of Florida issued a uniform bond and guilty plea schedule for the Preserve on October

no evidence that these low penalties encourage recidivism,³⁷
designation as a Federal Marine Sanctuary would:

- 1) subject violators to a maximum civil penalty of \$50,000 for each separate violation;³⁸
- 2) allow in rem proceedings against any vessel used in violating the Preserve's regulations for the amount of the penalty assessed;³⁹ and
- 3) empower the U.S. District Court to issue a restraining order against future violations.⁴⁰

C. Inadequate appropriations. The current operating budget for the administration of the John Pennekamp Coral Reef State Park is \$140,000,⁴¹ or roughly \$.40 per visitor. The Park staff includes two reef patrol officers and seven rangers, with the two reef patrol officers assigned to cover the entire 21 mile seaward Park boundary (where most violations occur) on a split-shift basis from dawn until dusk. According to the Park Director, the current budget is not sufficient to maintain existing equipment, purchase necessary replacement equipment, or

26, 1973. This schedule lists the penalties for 34 different violations.

³⁷ The Park Director could not recall a single incident of a repeated offense since the beginning of his assignment in March 1973. [Interview with Capt. Kuenzler, April 22, 1974.]

³⁸ 16 U.S.C. § 1433(a).

³⁹ 16 U.S.C. § 1433(c).

⁴⁰ 16 U.S.C. § 1433(d).

⁴¹ Park expenditures for FY73 totaled \$151,078. The FY74 appropriation, which is limited to maintenance and operating expenses, reflects a decreased allocation for the purchase of new equipment. [Telephone interview with Mr. Ellison Hardee, Deputy Chief of Operations, Division of Recreation and Parks, Department of Natural Resources, Tallahassee, April 26, 1974.]

provide enough reef patrol personnel.⁴²

If it were designated a Federal Marine Sanctuary, the State of Florida would be eligible to apply for Federal grants to defray annual acquisition, development and operating costs of the Preserve from a fund totaling as much as \$10 million per year.⁴³

IV. CONCLUSION AND RECOMMENDATION

The unique coral reef formation lying off the coast of Key Largo, Florida, known as the John Pennekamp Coral Reef State Park is not now being fully protected under existing Federal and State law. By designating this area a Federal Marine Sanctuary under the Marine Protection, Research and Sanctuaries Act of 1972, the reef's resources will receive the added protection it needs in order to be preserved for the use and enjoyment of future generations.

* * * * *

⁴²The Park Director estimates that increasing the number of reef patrolmen from two to four, and adding one patrol vessel to the Park's current "fleet" of three would provide adequate patrol coverage of the outer reef area. [Interview with Capt. Kuenzler, April 22, 1974.]

⁴³Note 15, supra.